Transit Service Corporation *and* Truck Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 707, an affiliate of the National Production Workers Union. Case 13–CA–30576

September 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The issues addressed here are whether the judge correctly found that: the Respondent did not violate Section 8(a)(5) of the Act by refusing to execute a collective-bargaining agreement because the parties had not determined the agreement's effective date; and whether the judge correctly found that the Respondent violated Section 8(a)(5) of the Act by withdrawing proposals and by refusing to meet with the Union.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Transit Service Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(c).

''(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Substitute the attached notice for that of the administrative law judge.

[1] On April 26, 1993, Administrative Law Judge Steven B. Fish issued the attached decision. The General Counsel and the Respondent each filed exceptions and a supporting brief. The General Counsel filed an answering brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to meet and bargain in good faith with Truck Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 707, an affiliate of the National Production Workers Union.

WE WILL NOT withdraw or retract bargaining proposals that we have made to or agreements we have reached with the Union, without good cause, or in order to frustrate bargaining or to prevent the reaching of a full agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL on request meet and bargain with the Union in good faith for at least 6 months thereafter as if the initial year of Board certification has not expired and if an understanding is reached, embody the understanding in a signed agreement.

WE WILL reinstate in its entirety for a reasonable time, our proposal for a 3-year contract incorporating the terms reflected in our draft contract sent to the Union on August 28, 1991, and bargain in good faith over the effective dates of the agreement.

TRANSIT SERVICE CORPORATION

Scott Gore, Esq., for the General Counsel.
Julius M. Steiner, Esq. and *Marjorie H. Gordon, Esq. (Obermayer, Rebmann, Maxwell and Hippel)*, of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed on October 11, 1991[1] by Truck Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 707, an affiliate of the National Production Workers Union (the Union), the Acting Director for Region 13 issued a complaint and notice of hearing on December 24, alleging that Transit Service Corp. (the Respondent) has violated Section 8(a)(1) and (5) of the Act.

[1] All dates herein unless otherwise indicated are in 1991.

The trial with respect to the above complaint was conducted on July 20, 1992, in Chicago, Illinois, during which the complaint was amended by General Counsel.

Briefs have been filed by Respondent and General Counsel and have been carefully considered. Based on my review of the entire record,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a corporation with an office and place of business in Chicago, Illinois, where it is engaged in the business of providing transportation services to elderly and disabled persons. During the calendar year, Respondent in the course and conduct of its business, derived gross revenues in excess of $250,000, and received at its facility products, goods, and materials valued in excess of $5000 directly from suppliers who have received these items directly from points located outside the State of Illinois.

Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

On October 9, 1990, the Union was certified as exclusive collective-bargaining representative of Respondent's employees in an appropriate unit consisting of all drivers employed at its North Clark Street facility.

On January 2, 1991, the Union by letter from its business representative, Sam Cozzo, requested collective-bargaining meetings with Respondent. Subsequently, a meeting was arranged for January 16, 1991, in a phone conversation between Cozzo and Julius Steiner, an attorney representing Respondent. Steiner sent a letter dated January 7, confirming his conversation with Cozzo and the date of the first meeting.

At that meeting, which was attended by Cozzo, Steiner, and Ed Mikalunas, Respondent's director of human resources, Cozzo presented a proposed contract, entitled, ''Labor contract and working agreement.'' The proposed agreement contained no effective dates, nor any termination date. These portions of the proposed contract were left blank. The proposal contains various clauses including recognition, union shop, subcontracting, seniority, arbitration, vacation, holidays, wages, health and welfare, and severance fund payments. The proposal for wages provided for various rates for for various classifications, plus two wage increases of 5 cents per hour, but with effective dates of the increases left blank. The health and welfare proposal called for contributions to be made on behalf of employees on and after June 1, 1990, and with increases effective January 1, 1991, and January 1, 1992. The severance fund proposal provided for payments of 50 cents per hour per employee, with subsequent increases of $1 and $1.50 per hour. However, the effective dates of all the severance payments was left blank.

The parties met again on May 20, but with Frank Stroud replacing Cozzo as the representative for the Union. At that time, Respondent submitted a document entitled, ''Company Contract Proposal.'' This document contained no starting, termination, or effective dates. No wage increase was included, although reference was made to minimum rates for each job. Agreement was reached on some noneconomic items such as union security, recognition, checkoff, grievance procedure, hours of work, and just cause for discharge. Steiner provided the Union on May 21, with a conformed copy of Respondent's proposal, which included the agreements reached by the parties.

On May 31, the Union provided Respondent with another written proposal. This document, rather than an entire contract proposal as previously submitted, was a three-page document, referred to as a ''list of demands.'' They include proposals for vacation, paid holidays, personal and sick days, health insurance, and payments to the Union's ''Fund,'' union visitation, overtime, and a management-rights proposal. Additionally, the Union proposed wage increases of $1 per hour, effective in 1991, 1992, and 1993, with no provision for what months the increases would be effective. Nor did this proposal contain any reference to starting termination or effective dates of the agreement.

The parties met again on June 21, during which the Union made still another written proposal; concerning which the parties discussed, reaching agreements on various provisions, and deferring others for future discussion. This document also contained no effective dates, nor any reference to the length of the contract. The duration of agreement clause was left blank. On July 3, Stroud sent to Steiner a copy of the Union's proposal which contained what Stroud believed to be the agreed-on provisions. This document also left blank the effective date of the contract, as well as the section entitled duration of agreement which set forth the starting and termination dates of the agreement.

On July 19, the parties met again, and for the first time began discussing the major economic items involved, particularly wages, in addition to discussing and reaching agreement on other items that had been in dispute.

Respondent made its first offer concerning wages. Initially, it offered a starting rate of $5 per hour, with a raise of 25 cents per hour every 6 months, up to a top rate of $6.75. Additionally, Respondent offered to distribute a bonus of 10 percent if it made a profit of 8 percent. However, Respondent informed the Union that it had lost $40,000 last month. After a caucus, the Union made a proposal of a raise of $1 per hour effective the first year of the contract, 75 cents per hour effective the second year of the contract, and 75 cents per hour, effective the third year of the contract. Respondent countered with a proposal which it entitled final, of 6 paid personal days a year, plus an additional proposal with respect to wages. In this respect, Respondent proposed a starting rate of $5 per hour, with raises to $5.25 after 90 days; to $5.50 after 180 days, and then raises of 25 cents per hour until the employee reaches the top rate. The top rate would start at $6.75 per hour as of August 1, 1991. For employees at that rate, there would be no increase in 1991. Thereafter, the top rate would be increased to $7 per hour on August 1, 1992, and to $7.25 per hour on August 1, 1993.

[2] While every apparent or nonapparent conflict in the evidence may not have been specifically resolved herein, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Accordingly, any testimony which is inconsistent with or contrary to my findings is discredited.

The meeting ended with Stroud informing Respondent's representatives that he would take a look at their last proposal and get back to them. After reviewing the situation, Stroud concluded that the Union could live with Respondent's proposals, and decided to accept. Therefore, he sent to Respondent a letter dated July 31. The letter states that ''the Union will accept all terms and conditions previously agreed to by the parties.'' The letter further requests a meeting during the calendar week beginning August 5, ''for the purpose of signing a contract since all terms have now been agreed to by the parties.''

After not hearing from Steiner, Stroud called in early August and agreed on a meeting for August 27. Shortly thereafter, Steiner called Stroud and canceled the August 27 meeting because Mikalanas was not available. They agreed to reschedule the meeting, and Stroud asked Steiner to send him a copy of what Steiner understood the parties had agreed on.

On August 28, Steiner as requested sent Stroud a copy of what he believed had been agreed on, with a covering letter stating, ''enclosed please find draft contract for your review, as per our recent discussion.'' The document forwarded to Stroud was entitled, ''Agreement.''[3] The ''Agreement,'' as furnished by Steiner, consisted of essentially Respondent's conformed copy of Respondent's proposals as agreed on as of May 21, plus some additional agreements reached subsequently, plus the following section entitled ''Wages and Increases'':

ARTICLE XXII

WAGES AND INCREASES

Wages:	
Starting Rate	$5.00 per hour
After 90 Days	$5.25 per hour
After 180 Days	$5.50 per hour
Thereafter every 6 months:	$.25 per hour until employee reaches top rate

REACHES TOP RATE

Top Rate	
10/1/91	$6.75 per hour
10/1/92	$7.00 per hour
10/1/93	$7.25 per hour

This document as was the case with all the previous documents exchanged between the parties, left blank the starting and termination dates, and made no reference to the effective date of the agreement. Subsequently, a meeting was scheduled for September 11.

On September 4, a decertification petition was filed in Case 13–RD–1933 by Wilma Windham, an employee of Respondent. Apparently because of an administrative backlog in the Regional Office, the petition was not mailed to Respondent, until September 25. That petition was eventually dismissed by the Region because it was filed prior to the 1-year expiration of the certification year. Windham refiled the petition on October 11, in Case 13–RD–1943. That petition was dismissed by the Regional Director on December 27, in view of the instant complaint, pending the outcome of this case. The record does not reflect whether Petitioner filed an appeal or a request for review of the Regional Director's action in this regard.

On or about September 5, Steiner telephoned Stroud and indicated that he wanted to cancel the September 11 meeting, because a decertification petition had been filed. Stroud replied that this was the first he had heard about a petition being filed, and that he had not received a copy of it. Stroud insisted that the meeting for September 11 be held as scheduled, regardless of whether a petition had been filed. Steiner said okay and agreed to meet on September 11 as previously agreed on.

The meeting was scheduled to begin at 9:30 a.m. at the Union's office. Steiner and Mikalunas arrived at 9:45 a.m. Upon arriving, Steiner made several phone calls, delaying the start of the meeting until shortly before 10 a.m. At the meeting, Stroud informed Steiner that he had been notified about the decertification petition.[4] Stroud asked Steiner whether the petition had been management inspired. Steiner replied, ''perhaps.'' Stroud informed Steiner that he agreed with the draft contract submitted to him by Steiner on August 28, and he was prepared to sign the contract. Steiner replied that the draft was not a complete agreement. Stroud replied that he would accept it as is, and Steiner responded that Respondent wanted a 4-year contract. Stroud told Steiner that the parties had been talking about a 3-year contract all along. Steiner disputed Stroud's assertion in this regard. Stroud then went back and looked at his notes, as well as the various proposals submitted by the parties. He stated that Steiner was right, that the parties had not talked about exact dates from year to year or length of the contract. However, Stroud did state that all the previous proposals, such as the health proposal of the Union, and the Union's wage proposals had been presented over a term of 3 years. Steiner continued to insist on a 4-year contract, with no wage increase in the fourth year of the contract. Stroud asked about the right to reopen the contract in the fourth year with the right to strike. Steiner responded that there can be no strike in the fourth year. Stroud then inquired if there was anything he could do to get a 3-year contract. Steiner said he was listening. Stroud then proposed a 3-year contract, and submitted some additional figures for wage increases which were rejected by Respondent.

Stroud then agreed to a 4-year contract, with a wage reopener but with a right to strike at that time. Steiner agreed to a wage reopener in the fourth year, but insisted that no strikes be allowed at that time. Stroud at that point stated that he wanted to call his lawyer. Stroud made the call from a phone in the room, and was told that his lawyer was not in, but would be beeped and should return Stroud's call within 5 minutes. He so informed Steiner, who was already gathering up his papers and starting to leave. Stroud asked Steiner and Mikalunas to wait 5 minutes for his attorney to call back. Steiner replied that he was there to negotiate and could not wait all day. Stroud responded that he had waited for Respondent's representatives for a half hour to start each negotiation (because of Respondent's representatives being late), so at least they could give him 5 minutes to wait for his attorney to call. Steiner answered that he was not waiting while Stroud chased his attorney down, and he was leaving.

[3] I note that the prior document submitted by Respondent was entitled ''Company Contract Proposal.''

[4] Stroud had been so informed by one of his representatives, who checked the docket book of filings at the Regional Office.

As Steiner and Mikalanas were walking out, Stroud said, ''If you want to be that way, get the fuck out.'' As he was leaving, Steiner told Stroud that there was no need to get upset, and added that Respondent was withdrawing its proposal. Steiner did not explain precisely what proposal he was withdrawing, and in fact Stroud did not hear Steiner withdraw Respondent's proposal.

In this connection, Respondent's witnesses, Mikalunas and Steiner, were unclear about precisely what proposal was being withdrawn. Mikalunas testified that Respondent was withdrawing its ''economic'' proposal. Steiner, on the other hand, contends that Respondent intended only to withdraw its proposal of a 4-year contract that it had made on that day, but that the withdrawal also included a withdrawal of its previous wage proposal which was incorporated in the 4-year proposal that it made. Thus, Steiner, asserted that he intended to reexamine the whole 4-year package including its wage proposal. However, Steiner conceded that he did not think that Stroud heard him withdraw Respondent's proposal, and I credit Stroud's testimony that he did not hear Steiner's purported withdrawal.

On October 7, Stroud sent a letter to Steiner, stating that the Union accepts all terms and conditions in his August 28 draft, plus his proposal of a 4-year contract with no increase in the fourth year as proposed by Respondent on September 11. Stroud further asked for a meeting at any time during the calendar week beginning October 7, for the purpose of signing a contract, since all terms have been agreed to by the parties.

Steiner responded by letter dated October 14. The letter states, ''as you are aware, the employer withdrew its proposal for reconsideration prior to your outburst and ejection of the company representatives from your office on September 11.''

The letter further states that the company is willing to meet to pursue negotiations, and suggested October 28 or 29 for this purpose.

Stroud responded by letter dated October 16, as follows:

> Dear Mr. Steiner:
>
> I received your letter dated October 14, 1991 today. This is the first mention of any withdrawal of your proposal to me. Your exact words to me were, ''that's the way it is, so take it or leave it.'' You also have a very short memory of what happened on September 11, 1991. While I was trying to contact my attorney for legal advise, you said you were not going to wait around until I talked to my lawyer, so you folded your papers and placed them in your brief case and said you were leaving. I asked you again to wait just a few more minutes until she returned my call. You refused to wait. Then I said to you that if you can't wait a few minutes so I could get some legal advise, then get the hell out.
>
> You must not forget that in the September 11th meeting I asked you about the decertification petition that you spoke to me about on the phone on September 5, 1991. My question to you was, ''was the petition management inspired.'' You answer was, ''perhaps so.''
>
> The Union is prepared to meet on October 28th or October 29th, 1991 at any time that is convenient to you and anywhere in the Chicago area you choose for the purpose of signing the agreement. Please advise.
>
> Sincerely,
> /s/ Frank E. Stroud
> General Vice President of the N.P.W.U.

Respondent did not reply to Stroud's October 16 letter, nor make any attempt to contact him about setting up another meeting.

My findings above are based on a compilation of the credited testimony of Stroud, Steiner, and Mikalunas, which is based on my evaluation of their comparative testimonial demeanor, my examination of their bargaining notes, and my assessment of the probabilities of their testimony in disputed areas. Overall, I found Stroud to be a more believable witness than either Mikalunas or Steiner, and have for the most part credited his testimony over that of Mikalunas and Steiner, except where the testimony of Respondent's witnesses is supported by their bargaining notes.

Additionally, I have relied on a number of other factors as described below. A most significant area of dispute between the parties is the question of Respondent's knowledge of the pendency of the decertification petition. As I have found above, Steiner first informed Stroud about the petition on or about Septemer 5, when Steiner attempted to cancel the September 11 meeting because of the filing of the petition, and the subject was mentioned again by Stroud at the September 11 meeting, during which he asked Steiner if management had inspired the petition. While both Steiner and Mikalunas denied finding out about the petition until the copy was received from the Board in late September, since as noted I found Stroud to be generally more credible, I have credited him in this instance as well. Additionally, I note that Stroud made specific reference to both discussions between he and Steiner concerning the decertification petition in his October 16 letter. However, Steiner made no effort to correct Stroud on this point either by letter or even by phone. As this record amply demonstrates, Steiner is and was an experienced and careful labor attorney, who would constantly put his positions and important conversations in writing. I find that had Stroud not been accurately relating the facts pertaining to their discussions of the decertification petition in his October 16 letter, Steiner would have made sure to send a letter disputing Stroud's assertions. This is particularly significant in my view because the Union had filed the instant charges on October 11.

Another important area of disagreement between the parties concerns Steiner's testimony that he did in fact respond to Stroud's October 16 letter by telephone, during which they allegedly discussed the status of negotiations, Steiner agreed to negotiate further with the Union, and Stroud allegedly agreed to get back to Steiner, which Stroud never did.[5] I have credited Stroud's testimony that no such conversation took place. In addition to my overall assessment of the relative testimonial demeanor of Steiner and Stroud, I also rely on other factors in making this determination. As I have previously discussed, I found Steiner to be an experienced and

[5] I note significantly that even in Steiner's version of this alleged conversation, he did not dispute Stroud's assertion in the October 16 letter that they had discussed the decertification petition on September 5 and 11.

careful labor practitioner who had a habit of putting important matters in writing. I conclude, therefore, that particularly where the Union had filed the instant charge, that he would confirm such a conversation in writing had it occurred. Rather, I believe that because Stroud's letter requested a meeting for purposes of signing an agreement, which Steiner was contending had not been reached, he saw no need to respond to the letter.

Furthermore, I also note that by this time, with the decertification petition now pending, it is obvious that the Union was desperate to sign any collective-bargaining agreement possible, in order to forestall the processing of the petition. The Union had agreed to sign a contract with no wage increase at all for employees at the top rate for the first year, but Respondent refused to agree, and added a fourth year to the contract with no wage increase at all in that year. The Union agreed to that proposal as well in its October 7 letter. Therefore, I find it inconceivable that the Union would ignore a request by Respondent for a meeting, wherein the Union might have been able to accept the Respondent's offer. Steiner's testimony that Stroud refused his request for a no-strike clause in the fourth year is simply not believable, since in my view the Union was so anxious to sign a contract, that this clause would not have been significant. While I have found that the subject of the reopener in the fourth year plus a no-strike clause was discussed at the September 11 meeting (as per the bargaining notes), I note significantly that Stroud made no mention of either the reopener or the no-strike clause in his purported acceptance. Thus, he was attempting to accept Respondent's initial offer of the 4-year contract with no raise in the fourth year. Because there was no mention of the reopener, there was no need for a no-strike clause in that year, because the general no-strike clause in the contract would be applicable. Therefore, for these reasons, I find that Steiner did not respond to the Union's letter of October 16.

Respondent also adduced testimony from Mikalunas and Steiner with respect to its decision to propose a 4-year contract and to withdraw its economic or wage proposals. Mikalunas testified that during the week prior to the September 11 meeting, he participated in a conference call with Steiner and Hawes, operations manager of Respondent. According to Mikalunas, they discussed the status of negotiations, as well as the fact that business was poor and Respondent was a ''financially troubled business.'' They also allegedly discussed that the Union was negotiating with other companies at the time, and that Respondent was concerned about getting trapped into a pattern bargaining situation with other companies. Therefore, Mikalunas asserts that they decided on a proposal of a 4-year contract with a wage reopener and a no-strike provision, so that Respondent could have ''another year of stability for a troubled company'' as well to ''avoid the situation at our bargaining.'' Mikalunas further testified that he and Steiner would have these discussions regularly with Hawes to report on and discuss the pending negotiations, and that prior to the early September discussion, the subject of the length of the contract had not arisen or been mentioned during these conversations. Mikalunas also testified that he had not discussed the issue in conversations with Steiner prior to this discussion, but that ''we may have assumed it was going to be a three year, but there wasn't a lot of discussion on it.''

Steiner confirmed that there had been a conference call a week before September 11 in which the 4-year proposal was discussed, but he did not detail any of the specifics of the conversations, nor provide any of the reasons for Respondent's decision to propose a 4-year agreement. Hawes did not testify.

With respect to Respondent's withdrawal of its proposal, as noted, I have found that Steiner did state at the end of the September 11 meeting as he was leaving, that Respondent was withdrawing its proposal, but that Stroud did not hear Steiner. In that connection, Mikalunas testified that Steiner intended to withdraw Respondent's ''economic'' proposals to ''take a look at them.'' According to Mikalunas, confirmed by his bargaining notes, Steiner withdrew Respondent's proposal after and in response to Stroud's getting excitable and upset.

Steiner's testimony with respect to the withdrawal was shifting and uncertain. At first, Steiner testified that he was only withdrawing Respondent's proposal for a 4-year contract but, on further questioning, changed his testimony to assert that he was withdrawing also Respondent's wage proposals. Later on in his examination also, Steiner changed once more and testified that he was only withdrawing the 4-year proposal and not Respondent's wage proposal. He further asserted that after the September 11 meeting, Respondent had received ''very bad'' third quarter financial results, causing it to decide that its previously offered wage proposal needed to be revisited and needed to be ''looked at.'' However, Steiner provided no details as to precisely when or how or by whom he was informed of these poor financial reports, and introduced no written corroboration or confirmation of Respondent's financial condition. Moreover, no testimony was adduced by Mikalunas or any other official of Respondent on this subject to corroborate Steiner concerning this alleged poor financial report.[6] In any event, Steiner admits that he never informed the Union about this alleged poor financial report at any time, even in his alleged conversation with Stroud, subsequent to Stroud's attempted acceptance of Respondent's 4-year proposal.

III. ANALYSIS

A. *The Alleged Unlawful Refusal to Sign a Contract*

It is not in dispute that an employer violates Section 8(a)(1) and (5) of the Act by refusing to execute a collective-bargaining agreement incorporating the terms agreed on by the parties during negotiations. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). The essential question to be determined is whether the parties reached a meeting of the minds on all material and substantive terms of a collective-bargaining agreement. *Ebon Services*, 298 NLRB 219, 224 (1990).

In making such a determination, however, it is clear that technical rules of contract law do not necessarily control the formation of a collective-bargaining agreement. *Auciello Iron Works*, 303 NLRB 562 (1991); *Pepsi Cola Bottling Co. v. NLRB*, 659 F.2d. 87 (8th Cir. 1981). In that connection, an offer made by one party remains subject to being accepted by the other party, even if the accepting party has earlier rejected the offer or made a counterproposal, unless the offeror expressly withdraws the offer or unless circumstances arise

[6] As noted above, Hawes did not testify herein.

which would lead the parties to believe that the offer has been withdrawn. *Inner City Broadcasting*, 281 NLRB 1210, 1216 (1986), and *Pepsi Cola*, supra.

In applying these principles to the instant matter, General Counsel argues that a full agreement was reached on all material terms on July 31, when the Union accepted the proposal made by Respondent at the July 19 meeting, and that this acceptance was repeated at the start of the September 11 meeting, when Stroud accepted the written proposal as prepared by Steiner, incorporating the agreement reached by the parties.

Respondent argues that the parties neither discussed nor agreed to significant material terms of the contract, to wit, the term of the contract or the effective, commencement, and termination dates of the agreement. *Raytown United Super*, 287 NLRB 1155 (1988); *Springfield Electric Co*., 285 NLRB 1305, 1306 (1987); *Koenig Iron Works*, 282 NLRB 717, 718 (1987).

While these, as well as other cases,[7] establish that these matters are material terms and must be agreed to before an agreement will be found, it is possible to infer agreement on effective date or term of the agreement based on other conduct of the parties, even absent specific discussion of these issues. *Luther Manor Nursing Home*, 277 NLRB 35 (1985); *Moran Oil Producing Co*., 204 NLRB 773 (1973); *Cabinet Mfg. Corp*., 144 NLRB 842, 843 (1963).

Here, while as Respondent correctly observes, the length of the contract was never specifically discussed by the parties, all the offers, proposals, and counterproposals made by both parties throughout the negotiations provided for yearly wage increases or in some cases health and welfare contributions, over a period of 3 years. Moreover, Mikalunas admitted that Respondent ''may have assumed it was going to be a three year [contract].'' Since it is also clear that Stroud on behalf of the Union also assumed that the contract was going to be for a 3-year term, I conclude that both parties believed that agreement had been reached on a term of 3 years, *Waste Systems Corp*., 290 NLRB 1214, 1219 (1988), and that the parties in practice used the dates of their various wage offers to determine the duration of the entire contract. *Luther Manor*, supra at 35.

Even if it is found that no agreement was reached on a 3-year agreement, as Respondent contends, there can be no question that an agreement on a 4-year term was reached when Stroud accepted Respondent's offer of a 4-year contract in his letter of October 7. Although Respondent did attempt to withdraw this offer at the close of the September 11 meeting, I have found, consistent with Steiner's own testimony, that Stroud did not hear Steiner's purported withdrawal. Therefore, since the withdrawal was not communicated to the Union, it was not effective, and still subject to being accepted by the Union. The fact that the Union and Respondent made several counterproposals, i.e., a reopener with or without a no-strike clause, after its initial offer was made, does not constitute a withdrawal of its previous offer of a 4-year contract with no wage increase in the fourth year, *Auciello*, supra, *Inner City*, supra, which the Union accepted.[8]

That leaves the question of the effective dates of the agreement, and whether General Counsel has established a meeting of the minds on that subject. I conclude that he has not.

While such an agreement can be implied from the circumstances of the bargaining, even absent specific discussion of the issue, *Luther Manor*, supra; *Moral Oil*, supra, I do not believe that the circumstances here permit such an inference to be drawn. I note initially that General Counsel contends that agreement was reached on July 31 when Stroud notified Respondent of the Union's agreement to Respondent's last proposal offered on July 19. Yet, that proposal called for wage increases at intervals of 3 years, starting on August 1, 1991. However, when Steiner, at Stroud's request, prepared what Steiner believed to be the agreement reached by the parties, he changed these dates to three intervals starting on October 1, 1991. At the start of the September 11 meeting, Stroud accepted this proposal, while testifying that he believed that he was agreeing to a contract with an effective date of October 1, and an expiration date of September 30, 3 years later. However, this matter had never been discussed, and I do not believe one can infer from statements, conduct, or admissions of Respondent that Respondent had agreed with that view. In fact, since Steiner did not explain why he changed the dates for measuring increases from August to October, it seems to me that he did so because he knew that the agreement would not be signed until the parties met sometime in September. Therefore, I conclude that Steiner left the starting and termination dates blank on the draft contract that he prepared on August 28 because he did not know the date of the parties' meeting at the time he prepared the document, and that he intended that the effective date of the agreement would be the date the contract was signed, which would have been September 11, had Respondent not refused to sign upon the Union's acceptance. Indeed, General Counsel argues that an effective date of September 11 should be ordered because it is ''reasonable and equitable.'' *Moran Oil*, supra. I do not agree. The issue is not whether the date the contract could have been signed is ''reasonable and equitable,'' but whether the parties implicitly or explicitly agreed to that date. *Moran Oil*, supra, relied on by the General Counsel, in the Board's footnote 2, emphasized the fact that the effective dated ordered by the administative law judge was consistent with agreements reached on other portions of the contract, i.e., the finalizing effect of ratification. Thus, the best that could be said for the General Counsel's case is that both parties believed that agreement had been reached on all terms of a contract, but that Respondent believed the effective date would be September 11 and the Union believed it to be October 1. This does not constitute a meeting of the minds on an important subject, and indicates a mutual misunderstanding or mistake regarding the effective date of the agreement. *Cherry Valley Apartments*, 292 NLRB 38, 40 (1988).

[7] *Imprint Co*., 273 NLRB 1863 (1985); *Mercedes Benz of North America*, 258 NLRB 803 (1981).

[8] I note that because the Union's acceptance of the Respondent's offer made no reference to a reopener in the fourth year, there is no need for a separate no-strike clause for the fourth year, inasmuch as the no-strike clause in the proposed agreement covers the entire term of the agreement.

Therefore, I conclude that, although the Union purported to accept Respondent's offer on September 11, consisting of Steiner's August 28 document, there was no meeting of the minds on the question of effective dates, and that Respondent did not violate Section 8(a)(1) and (5) of the Act by refusing to execute an agreement *Cherry Valley*, supra; *Imprint*, supra; *Springfield*, supra.

Although I have found above that the Union accepted Respondent's offer of a 4-year agreement by Stroud's October 7 letter which obviates any problem with finding an agreement on the contract's duration, the issue of the effective date had still not been resolved. At that point, the October 1 date for the measuring of the first wage increase had passed, and there is no testimony in the record from Stroud as to what effective date he intended to accept, when he agreed to Respondent's proposal. In these circumstances based on the above analysis and authorities, the absence of a meeting of the minds on the effective date of the contract prevents a finding that full agreement was reached on October 7, and compels a finding that Respondent did not violate Section 8(a)(1) and (5) of the Act by refusing to execute an agreement with the Union on and after October 7 or at any other time. Therefore, I shall recommend that the allegations of the complaint, as amended, which so allege shall be dismissed.

B. *The Alleged Unlawful Withdrawal of Proposals*

As Respondent correctly argues, a withdrawal of a proposal previously agreed on is not necessarily violative of the Act or indicative of bad faith. *Dubuque Packing Co*., 287 NLRB 499, 539 (1987); *Reliable Tool Co*., 268 NLRB 101 (1983); *NLRB v. Tomco Communications*, 567 F.2d 871, 883 (9th Cir. 1978); *Food Service Co*., 202 NLRB 790, 803 (1973).

However, such a withdrawal will be considered unlawful and designed to frustrate bargaining unless the Employer demonstrates that it had good cause for the withdrawal of proposals to which it had previously agreed. *Natico, Inc*., 302 NLRB 668, 670–671 (1991); *Arrow Sash & Door Co*., 281 NLRB 1109 fn. 2 (1980); *Northwest Pipe & Casing Co*., 300 NLRB 726 (1990); *NLRB v. F. Strauss & Sons, Inc*., 536 F.2d 60, 64 (5th Cir. 1976); *Mead Co*., 256 NLRB 686 (1981), enfd. 697 F.2d 1013, 1022 (11th Cir. 1983).

Here, since I have found above that the parties had implicitly agreed to a 3-year contract by their previous positions and conduct, Respondent's decision to withdraw that proposal and substitute a 4-year contract with no raise in the final year must be evaluated under the good cause standard. Respondent's only attempt to demonstrate good cause for its change of position comes from the testimony of Mikalunas who recounted an alleged conference call, involving Steiner, Hawes, and himself wherein the decision to propose the 4-year agreement was allegedly made. I find that this testimony is insufficient to establish good cause. Mikalunas claims that Respondent decided on the 4-year proposal because of its allegedly poor financial condition and because it was concerned about being trapped into a ''pattern bargaining situation.'' However, neither Mikalunas nor any other of Respondent's witnesses testified as when these matters came to its attention. Indeed, the record reveals that Respondent had been consistently complaining about its poor financial condition throughout the bargaining, and that at the July 19 meeting, when it made its wage increase offer, informed the Union that it had lost $40,000 last month. Additionally, Respondent has not established that its pattern bargaining fears were a recent problem, and it can be assumed that it was aware of the Union's efforts to bargain with other employers throughout the negotiations. Thus, since these issues, i.e., the poor financial condition of Respondent, plus the alleged problem of pattern bargaining, were known to Respondent when it made its offers on the basis of a 3-year contract, I cannot conclude that these items motivated its subsequent change of position to a 4-year proposal on September 11.

Rather, the evidence demonstrates to me that the withdrawal was motivated by the filing of the decertification petition, and Respondent's consequent desire to avoid reaching agreement so that the decertification petition could be processed. It is noteworthy that on or about September 5, Steiner called Stroud and sought to cancel the meeting previously scheduled for September 11, because the decertification petition had been filed. It is significant to note that all terms of an agreement, other than effective dates, had been agreed upon, Steiner had previously sent the Union a draft contract on August 28, and Respondent obviously and correctly believed that the Union intended to sign that document, after the effective date was agreed on,[9] on September 11. Steiner being an expereinced labor attorney was aware that Respondent could not lawfully refuse to meet because of the decertification petition, so when Stroud insisted on meeting as scheduled on September 11, Respondent in my view found another way to avoid reaching agreement prior to the end of the certification year (October 9). Therefore, I find that Respondent has not established good cause for its decision to withdraw its 3-year proposal, and substitute a 4-year contract with no raise in the fourth year, and that in fact this proposal was made in order to avoid an imminent agreement being reached,[10] prior to the end of the certification year. *Mead Co*., supra; *F. Strauss*, supra at 64; *Natico Pipe & Casing Co*., 300 NLRB 726, 734 (1990).

Accordingly, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by such conduct.

Furthermore, at the close of the September 11 meeting, Respondent attempted to withdraw its proposal which included its prior wage increase package that had been included in its draft contract. It subsequently confirmed in writing that withdrawal by its letter of October 14, after the Union attempted to accept the 4-year proposal in its October 7 letter. General Counsel contends, and I agree, that these actions of Respondent were similarly motivated by a desire to avoid reaching agreement, and were not shown to have been for good cause. Respondent argues in its brief that the proposals were withdrawn ''in response to Stroud's angry diatribe and refusal to continue to negotiate,'' and that the wage proposal was withdrawn for economic reasons (i.e., Respond-

[9] Although I have found above that the absence of an agreement on effective dates precludes a finding that a full contract was agreed on, there is little doubt that this issue would not have been a problem. The Union was clearly anxious to sign any contract, and whether the effect date was September 11 or October 1 undoubtedly would not have mattered, and I conclude that Respondent so believed.

[10] Indeed, it is also significant that Respondent did not propose the 4-year contract on September 11, until after the Union agreed to sign Steiner's August 28 draft contract.

ent's allegedly poor third quarter financial results). I do not agree.

It is true that Stroud ordered Respondent's representatives to leave in a hostile manner coupled with the use of an obscenity. However, I note that Respondent's representatives were in the process of leaving anyway, because Steiner would not wait 5 minutes for the Union's attorney to return Stroud's call. I find this conduct of Respondent to be clearly inappropriate, particularly in view of the fact that Respondent's representatives had themselves been late for the very same meeting. Thus, I conclude that Respondent's conduct provoked Stroud's outburst, which in any event would not provide sufficient justification for Respondent to withdraw its previously agreed-to wage proposal.

Respondent's reliance on its alleged poor third quarter report is equally misplaced. I note initially that Mikalunas furnished no supporting testimony to Steiner's unsubstantiated contention that such a report motivated Respondent's actions. Moreover, Respondent failed to introduce the alleged financial records, nor did Steiner provide any details as to precisely when or from whom he found out about its poor third quarter results. Most importantly, I have found that Respondent intended to withdraw its wage proposal at the close of the September 11 meeting, although Stroud did not hear Steiner's attempt to do so. Thus, since even Steiner contended that he found out about the third quarter results after the September 11 meeting, that could not have been a factor in its decision to attempt to withdraw its wage proposal at that meeting.

Rather, the evidence overwhelmingly demonstrates that these withdrawals and attempted withdrawals were but a continuation of Respondent's earlier unlawful conduct of withdrawing its previous agreement on a 3-year contract. Respondent was continuing in its efforts to avoid signing an agreement that it knew or at least believed the Union was ready to accept, in the hopes that the certification year would end and the decertification petition would be processed. I find that Steiner's actions of not waiting 5 minutes for the Union's attorney to call back, not only to be inappropriate as described above, but motivated by a desire to terminate the meeting before its last offer could be accepted by the Union. Respondent obviously knew how desperate the Union was to sign an agreement, particularly in view of the pending decertification petition. I also conclude that when Stroud asked for time to call his attorney, Respondent believed that the completion of the call would result in the Union agreeing to its 4-year proposal. Thus Respondent was anxious to leave before that event transpired. This conclusion is fortified by the fact that the Union in its October 7 letter did accept Respondent's 4-year proposal, with no raise in the fourth year, and that Respondent rejected that acceptance on the assertion that the offer had been withdrawn at the September 11 meeting.

Based on the foregoing, I am persuaded that Respondent's withdrawals and attempted withdrawals of its wage proposal were not supported by good cause, and were designed to avoid an imminent agreement. *Mead*, supra; *Natico*, supra; *Arrow Sash*, supra; *Northwest Pipe*, supra; *F. Strauss*, supra. Therefore, it has violated Section 8(a)(1) and (5) by this conduct.[11]

C. *The Alleged Refusal to Meet and Bargain*

I have found above that Respondent ignored and made no response to the Union's letter of October 16, in which Stroud requested a meeting ''for the purpose of signing the agreement.'' While Respondent has provided no defense to or reason for its refusal to respond,[12] I suspect that Respondent may have viewed the letter as a request to meet only for the purpose of signing a contract, and did not reply since it believed that no contract had been agreed on.

However, such a position is no defense to Respondent's refusal to meet. An employer faced with a demand to meet in order to sign a contract, cannot simply ignore the request, even if no contract had been agreed on. It is obligated to inform the Union that it believed that no agreement had been reached, and offer the Union the opportunity to change its position and continue to bargain. *Petropoulos Bros. Appliances*, 169 NLRB 1161, 1167–1168 (1968); *Plastiline, Inc*., 190 NLRB 365, 374 (1971); *Case Concrete*, 220 NLRB 1306, 1309 (1975); *Tile, Terrazzo & Marble Assn*., 287 NLRB 769, 782 (1987). See also *Stanford Realty Co*., 306 NLRB 1061 fn. 2 (1992) (request to sign a contract subsumes a demand to recognize and bargain).

Therefore, since Respondent herein made no reply and ignored the Union's request to meet in Stroud's letter of October 16, it has thereafter refused to meet and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act. *Petropoulos Bros*, supra; *Tile Terrazzo*, supra; *Stanford*, supra.

D. *The Decertification Petition*

General Counsel requests that the dismissal of the RD petition in Case 13–RD–1943 be upheld, or in the alternative that a finding be made that Respondent's conduct was so serious that any petition filed after September 11 was tainted.

General Counsel citing *NuAimco, Inc*., 306 NLRB 978 (1992), in which the Board, in approving a settlement agreement, observed that not every unfair labor practice is sufficiently serious to taint a decertification, argues that a finding that the conduct here is sufficiently serious is warranted.

However, General Counsel has cited no case or other authority that permits such a determination to be made, where as here, the representation case has not been consolidated with the instant matter, and is not before me. Indeed, I note that the petition and the dismissal letter have not even been introduced into the record. Nor does the record show whether Petitioner has filed a request for review of the Regional Director's dismissal. Nonetheless, assuming the General Counsel's description of these documents to be accurate, I do not

[11] I would come to the same conclusion, with regard to the wage proposal, even if it were found that no agreement had been reached on a 3-year agreement, and that the 4-year proposal was not unlawful. Steiner's conduct in not allowing the Union 5 minutes to receive a call from its attorney, coupled with Respondent's failure to adequately document its economic defense, clearly demonstrates that these withdrawals were an unlawful attempt to avoid signing an agreement.

[12] As noted, Steiner asserted that he did in fact reply by telephone to Stroud's letter, but I have not credited Steiner's testimony in this respect.

believe that it is appropriate for me to rule on the representation case which has not been made a part of this proceeding.

The fact that as the General Counsel argues the Petitioner was served with a copy of all the relevant documents herein, including the complaint and notice of hearing, is not sufficient in my view to overcome this obstacle to my deciding representation case issues. See for example *Jefferson Hotel*, 309 NLRB 705 (1992), and *Canter's Fairfax Restaurant*, 309 NLRB 883 (1992), in which the Board required that a petitioner be a party to any settlement agreement that provided for dismissal of a decertification petition, finding that mere notice to the petitioner and the opportunity to be a party to the agreement is insufficient to justify such a dismissal.

Accordingly, I conclude that in the context of this case, I am without authority to rule on the representation case, and that in any event it would be inappropriate to do so, without the Petitioner having had the opportunity to state her position and be heard on the matter. I would note, however, that of course the Regional Director will be able to consider my unfair labor practice findings above, should the Petitioner request that the petition be reinstated, after compliance with the Order herein.

Therefore, I shall deny the request of the General Counsel to make findings with respect to the representation case.

CONCLUSIONS OF LAW

1. Transit Service Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Truck Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 707, an affiliate of the National Production Workers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has been at all times material herein the designated and exclusive collective-bargaining representative of the employees in an appropriate unit consisting of:

> All drivers employed by the Respondent at its facility currently located at 4711 North Clark Street, Chicago, Illinois; excluding all office clerical employees, professional employees, guards, supervisors as defined in the Act and all other employees, and owner operators.

4. By withdrawing bargaining proposals in order to frustrate bargaining and to prevent the reaching of an agreement, and without good cause, Respondent has violated Section 8(a)(1) and (5) of the Act.

5. By refusing to meet and bargain with the Union on or after October 16, 1991, Respondent has violated Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. General Counsel has not established by a preponderance of the evidence that Respondent has otherwise violated the Act as alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in violations of Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. In this regard, I shall recommend that the certification year be extended for an additional 6 months. *Den-Tal-Ez, Inc*., 303 NLRB 968 fn. 2 (1993).

Additionally, I also do not believe that merely ordering Respondent to bargain with the Union will provide sufficient relief for the violations committed herein. I have found above that Respondent withdrew its offer of a 3-year contract on September 11 in order to prevent the Union from accepting its previous offer as set forth in Steiner's August 28 draft contract. Although the Union's purported acceptance was ineffectual, because the effective dates had not been agreed to, Respondent's action nonetheless had the desired effect of preventing agreement. Indeed, I am confident that had Respondent not withdrawn its 3-year offer, the parties would have quickly resolved the question of the effective date, and reached agreement on that date, nearly a month before the expiration of the certification year. In these circumstances, I deem it appropriate to restore the status quo to the extent feasible by ordering Respondent to reinstate its unlawfully withdrawn proposal of a 3-year agreement along with Steiner's August 28 draft contract, and bargain in good faith with the Union over the effective dates of the agreement. *Mead Corp*., 256 NLRB at 686–687; *Northwest Pipe*, 300 NLRB at 736–737; *Star Dental*, supra.

In the event that a finding is made that Respondent did not violate the Act by withdrawing its 3-year contract proposal, I would recommend alternatively that a similar remedy would be appropriate with respect to Respondent's 4-year contract proposal. Thus, once again I have concluded that Respondent's withdrawal of this proposal which included withdrawal of its previous wage proposal as reflected in its August 28 draft contract was also designed to prevent the Union from accepting the proposal and to frustrate agreement. Therefore, a remedy of requiring the reinstatement of its 4-year proposal, including all the terms set forth in the August 28 draft contract would best effectuate the Act and restore the status quo. *Mead*, supra; *Northwest Pipe*, supra; *Star Dental*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Transit Service Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to meet and bargain in good faith with Truck Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 707, an affiliate of the National Production Workers Union.

(b) Withdrawing or retracting bargaining proposals made to or agreements reached with the Union, without good cause, or in order to frustrate bargaining or to prevent the reaching of a full agreement with the Union.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and bargain with the Union in good faith for at least 6 months thereafter as if the initial year of Board certification has not expired and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Reinstate in its entirety for a reasonable time, its proposal for a 3-year contract incorporating the terms reflected in its draft contract of August 28, 1991, and bargain in good faith over the effective dates of the agreement.

(c) Post at its Chicago, Illinois facility copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint, as amended is dismissed insofar as it alleges violations not found herein.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''